Supreme Court, U.S.
FILED
05-762 DEC - 9 2005
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

MONROE WHITE, SR.,

Petitioner,

v.

R. JAMES NICHOLSON,
Secretary of Veterans Affairs,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Court of Appeals for the Federal Circuit approved the United States Court of Appeals for Veterans Claims' decision in *Johnson v. Principi*, 17 Vet. App. 436 (2004). That case holds that the government is substantially justified under the Equal Access to Justice Act, 28 U.S.C. §2412(d), in promulgating and enforcing a facially invalid regulation so long as the court decision which invalidated the regulation is a case of first impression and there was "no prior adverse reaction." The questions presented are:

> Is the absence of prior contrary case law sufficient to meet the government's burden under the Equal Access to Justice Act to demonstrate that it was substantially justified in promulgating and enforcing a facially invalid regulation.
>
> For the purpose of the Equal Access to Justice Act, when the government's position was its promulgation and enforcement of a regulation which the merits panel found to be contrary to the plain language of the controlling statute and invalidated under step one of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) does the decision of the merits panel control the reasonable basis in law analysis under *Pierce v. Underwood*, 487 U.S. 552, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Monroe White, Sr. respectfully petitions the Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit, which affirmed the dismissal of petitioner's application for attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412(d), is reported at 412 F.3d 1314 (Fed. Cir. 2005), and is reproduced at App. 1. The Federal Circuit's unreported decision denying rehearing and rehearing *en banc* is reproduced at App. 20. The unreported decision of the United States Court of Appeals for Veterans Claims ("the Veterans Court"), which denied the petitioner's claim for attorney fees, is reproduced at App. 12. The unreported decision from the Veterans Court in the underlying merits claim is reproduced at App. 15.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit affirming the dismissal of petitioner's fee application was entered on June 16, 2005. App. 1. Petitioner's timely petition for rehearing or, in the alternative, rehearing *en banc* was filed on July 31, 2005, and denied by the Federal Circuit on September 13, 2005. App. 20. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The Equal Access to Justice Act (EAJA), 28 U.S.C. §2412(d), provides in relevant part:

> (1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of an agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> (B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is

based) which is made in the civil action for which fees and other expenses are sought.

STATEMENT OF THE CASE

Petitioner White filed a petition in the United States Court of Appeals for Veterans Claims for reimbursement of fees and expenses under the Equal Access to Justice Act, 28 U.S.C. §2412(d)(1). The Veterans Court held that the government's conduct in promulgating a facially invalid regulation was substantially justified, and denied the EAJA claim under its precedent in *Johnson v. Principi*, 17 Vet. App. 436 (2004) ("the *Johnson* rule"). Under the *Johnson* rule, a governmental agency is substantially justified in promulgating and enforcing a regulation which contravenes the plain language of the controlling statute, so long as the judicial action which invalidated the regulation was a case of first impression and there was no "prior adverse reaction" to the proposed promulgation of the regulation. The *Johnson* rule effectively eliminates EAJA awards in all cases in which the agency's position was its promulgation and enforcement of a facially invalid regulation.

The Federal Circuit found the *Johnson* rule to be persuasive, and affirmed the denial of Petitioner White's EAJA petition. The Federal Circuit's decision conflicts with decisions of the United States Courts of Appeals for the District of Columbia and the Seventh Circuits. Additionally, it is inconsistent with *Pierce v. Underwood*, 487 U.S. 552, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988), which holds that "substantially justified" means having a reasonable basis in both law and fact, in light of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467

U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), which allows an agency no discretion to promulgate and enforce a regulation which departs from unambiguous language of the controlling statute.

A. Nature of Petitioner White's Underlying Claim on the Merits

Petitioner White is a U.S. Army veteran. In 1993, he filed a claim with the Department of Veterans Affairs (VA) Regional Office for disability compensation benefits because of a back injury. App. 2. In 2002, his claim was before the Board of Veterans' Appeals for administrative review. Under 38 U.S.C. §7104(a), and consistent with VA's prior practice at 38 C.F.R. §§19.9 and 20.1304 (2001), the Board was required to remand Petitioner White's disability claim to a VA regional office for a new decision. However, effective February 22, 2002, the Secretary of Veterans Affairs revised 38 C.F.R. §19.9. The Secretary's stated objective was to improve claims processing efficiency by eliminating what the Secretary viewed as "unnecessary and time consuming remands for further evidence gathering." *Disabled American Veterans v. Secretary of Veterans Affairs*, 327 F.3d 1339, 1346 (Fed. Cir. 2003) citing to the Secretary's comments published in the Federal Register, 66 Fed. Reg. at 40,943.

Instead of remanding Petitioner White's claim to the VA's regional office as required by 38 U.S.C. §7104(a), the Board denied it pursuant to the newly revised 38 C.F.R. §19.9(a)(2). Mr. White appealed to the Veterans Court from the Board's denial of his claim.

B. The Federal Circuit's *DAV* Decision Which Invalidated 38 C.F.R. §19.9(a)(2) (2002)

Three veterans advocacy organizations petitioned the Federal Circuit for review of revised Section 19.9(a)(2) (and other VA regulations which are not relevant to this appeal). They successfully argued that Section 19.9(a)(2) violated the controlling statute at 38 U.S.C. §7104(a). *Disabled American Veterans, supra,* 327 F.3d 1339 (referred to below as the *DAV* case, or the *DAV* decision).

In the *DAV* decision, the Federal Circuit reviewed the regulation under the two-step framework established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984):

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

The second step of the *Chevron* analysis, which requires deference to the agency's regulation if it is based on a permissible construction of the statute, is not triggered unless the statute is ambiguous. *Id.*

Because 38 C.F.R. §19.9(a)(2) was contrary to the plain language of the controlling statute, 38 U.S.C. §7104(a), the Federal Circuit invalidated Section 19.9(a)(2) under *Chevron's* first step. The court held that –

> . . . Congress unambiguously addressed this issue in 38 U.S.C. §7104(a) . . . The VA therefore

> has no choice but to give effect to Congress's clear intent. *See Chevron*, 467 U.S. at 842-43, 104 S. Ct. 2778 .

Disabled American Veterans, supra, 327 F.3d at 1347.

The agency's stated goal in promulgating the regulation – improved claims processing efficiency – did not save it. The Federal Circuit stated, at 327 F.3d at 1348:

> . . . [E]ven though the amendments to §19.9 may further the VA's stated objective of efficiency, striking the sensible balance between decreasing appeal processing times and the competing public policy of protecting an appellant's right to due process is a matter for Congress, not this court.

The Veterans Court vacated the 2002 Board of Veterans' Appeals' denial of Petitioner White's claim and remanded it to the Board for further action consistent with the Federal Circuit's *DAV* decision. App. 17.

C. Proceedings on Petitioner White's Fee Application in the Court of Appeals for Veterans Claims and Applicable EAJA Principles

Petitioner White timely filed a petition with the Veterans Court for reimbursement of fees and expenses incurred in connection with his appeal from the 2002 Board of Veterans' Appeals' decision. The Veterans Court denied his EAJA petition because it found that the Secretary of Veterans Affairs was substantially justified in promulgating Section 19.9(a)(2) – even though the regulation violated the plain language of the controlling statute. App. 13.